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Supreme Court of

OCTOBER, 1944 TERM

No. 1060

H. WILLIAM BLAIR,
Receiver of Detroit Bankers Company,
Petitioner and Plaintiff Below,
vs.
THE UNITED STATES,
Respondent and Defendant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

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United States of America

IN THE

Supreme Court of the United States

OCTOBER 1946 TERM

No.....

H. WILLIAM KLARE,
Receiver of Detroit Bankers Company,
Petitioner and Plaintiff Below,

vs.

THE UNITED STATES,
Respondent and Defendant Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To: The Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

QUESTIONS OF PUBLIC INTEREST

(a) Should the Government account for Trust Funds totalling $5,000,000—which it disbursed contrary to law?

(b) The Government took control under the National Bank Act—and then disbursed $3,500,000 for private attorneys fees and $1,250,000 for Clerks' hire in Washington—

all of which was prohibited by specific Acts of Congress.

Should the Government now account?

(c) Bank stockholders—who paid their double stock assessment liability—first brought class actions for such an accounting.

May the Government defeat such actions in the Court of Claims (Nos. 45,956 and 45,957) on the ground that the Receiver of the stock Holding Company was the proper party plaintiff (see 102 Court of Claims, 233) then when that Receiver brings suit—defeat it on demurrer on the ground that the stock assessment paying individual Bank stockholders were the real parties in interest?

(d) Are positive prohibitions by the Congress to be violated by a Department of the Government—without any Remedy by the *cestui que trust* in any Court?

(e) Are Trust Funds taken possession of by the Government, under no claim of title or of right—

to be accounted for under the usual rules governing a Trustee's duties?

SUMMARY OUTLINE OF FACTS

I. Two Court of Claims trust fund accounting actions—

for $5,000,000 of a closed National Bank's assets—

admittedly disbursed by the Treasury—contrary to specific Acts of Congress—

were defeated without hearing on the merits—

and

under these circumstances:

(a) The Government, with all the facts before it,

first claimed in Causes Nos. 45,956 and 45,957 that individual National Bank stockholders (who had paid their double liability stock assessments) were not proper class suit plaintiffs—and asserted to the Court of Claims that their Holding Company Receiver should bring the accounting action—see 102 Court of Claims 233.

(b) Then—when the same accounting action was again brought by such Holding Company Receiver in a new action, Cause No. 46,771, the Government then claimed on a speaking demurrer—

that the Holding Company's predecessor Receiver had previously settled all claims against the closed National Bank Receiver. Thereupon, the Court of Claims sustained a second demurrer—

although the Holding Company's Receiver's Court of Claims Petition (Cause No. 46,771)

specifically averred complete lack of any prior knowledge of the claimed secret and illegal expenditures by the closed National Bank Receiver of—

(1) $3,500,000 for private Bank Receiver's Attorney fees, and

(2) $1,251,000 of so-called Clerks' hire in Washington in the Insolvent Bank Division of the Treasury Department.

See Petition, paragraph (48) Pages 31 and 32

(c) The Second ground of the Court of Claims decision of December 2, 1946, (here reviewed) was that the Receiver of Detroit Bankers Company had, under a Court order entered in 1938, transferred all the closed National Bank shares (owned by Detroit Bankers Company since 1929) to the National Bank Receiver (appointed by the Comptroller of the Currency in 1933)

"to hold said shares of stock as custodian for the shareholders of Detroit Bankers Company."

(See Court of Claims opinion of December 2, 1946)

To this Reasoning—Petitioner begs to answer that the National Bank Receiver deliberately closed the Bank Receivership in 1943—under the orders of the Comptroller of the Currency—

without accounting to anyone for the $5,000,000 of Trust Funds—and no one now knows where the stock certificates are—or whether they were destroyed in the Comptroller's office in Washington or not.

Moreover—the Court of Claims in its opinion of December 4, 1944 (102 Court of Claims 233) expressly stated it had "no idea as to either the purpose or the legal effect of this deposit of the stock."

Furthermore—all these facts were well known to the Government at all times since said Court Order of 1938—

but no claim was made by the defendant in the previous accounting actions (Court of Claims Nos. 45,956 and

45,957) other than that the Receiver of Detroit Bankers Company should bring the accounting action—instead of the individual class suit Bank stockholders, who had paid their stock assessments to the Bank's Receiver.

And now—that such Receiver of Detroit Bankers Company has brought the accounting action, as authorized by the State Courts of Michigan on June 26, 1945, see Exhibit A attached to the petition, R. 34, and—

as directed by the Honorable Court of Claims in its opinion of December 4, 1944, 102 Court of Claims, 233—

we find the Court of Claims at the Government's request, has reversed itself and now says in its third and last ground—put forward to defeat Plaintiff and Petitioner in the instant accounting action, that:

> "The stockholders of the bank, as such, receive a dividend only if the creditors have been paid in full and the assessments have been repaid. *The creditors of First National have been paid, but, so far as appears from the petition, no part of the $19,000,000 paid in by assessed shareholders has been repaid.* Even if the plaintiff's principal were a shareholder in First National, it would not, therefore, benefit by the recovery of the approximately $5,000,000 claimed in this suit. It may not, therefore, maintain the suit. The Government's demurrer is sustained, and the petition is dismissed.
>
> It is so ordered."

(d) SUMMARY OF TWO COURT OF CLAIMS OPINIONS—

1st—The first accounting class suit actions (Court of Claims Nos 45,956 and 45,957) were brought by individual stock

assessment paying National Bank stockholders—and were defeated on demurrer, on the sole ground that their

Bank stock Holding Company's Receiver (of Detroit Bankers Company) should have brought the action. See 102 Court of Claims 233, opinion filed December 3, 1944.

2nd—Then when the Receiver of Detroit Bankers Company brings the accounting action at bar (Court of Claims No. 46,771) the Honorable Court of Claims sustained the Government's demurrer on the extremely illogical grounds that—

(a) the National Bank Receiver was made custodian of the Bank shares "for the stockholders of the Detroit Bankers Company."

(b) It is immaterial that the Bank Receiver did nothing to protect the Bank's stockholders rights whose "stock" he was made "custodian" of.

(c) It is also immaterial that the Government in the first accounting actions contended that the Receiver of Detroit Bankers Company was the necessary party plaintiff—

and that such Receiver is now the plaintiff in this pending action—appointed for that very purpose by the Michigan State Courts—to conform to the ruling and opinion of the Court of Claims filed December 4, 1944 (102 Court of Claims 233).

(d) Notwithstanding all this—

now such Receiver of Detroit Bankers Company cannot maintain this accounting action because the Detroit Bankers Company did not pay any of the $20,000,000 of National Bank stock double liability assessments—

See the concluding paragraph of the Court of Claims' opinion of December 2, 1946 in the case at bar No. 46,771.

3rd—So now—we have the Court of Claims saying on December 2, 1946, in the Receiver's action, that the very stock assessment paying Bank stockholders—are the proper parties to bring suit for this $5,000,000 of illegally disbursed trust funds—

which stockholders the Honorable Court of Claims had previously ruled on December 4, 1944 (102 Court of Claims 233) could not maintain the action—because the present plaintiff, Klare, Receiver, should bring the action.

For the Court of Claims—so said—in so many words (102 Court of Claims 233) that:

> "The one, therefore, who has the primary interest in conserving the assets of the First National Bank-Detroit, if the receiver of that bank refuses to do his duty, is the receiver of Detroit Bankers Company, which owns all the stock of First National. The plaintiffs make no showing that they have called in vain upon him."

II. (a) The Acts of Congress absolutely prohibit the Secretary of the Treasury—

to disburse funds of a closed National Bank—

for (1) private attorneys for its receiver and (2) Clerk's hire in Washington.

(b) In the years 1933 to 1943—the Treasury actually spent $3,500,000 of the closed First National Bank-Detroit's funds for so-called attorneys fees paid to a Cincinnati, Ohio firm of lawyers—

and $1,250,000 for claimed Clerks' hire in the Treasury Department in Washington—

although the Bank's Receiver's offices and books were all kept and the liquidation of all the Bank's assets took place in Detroit, Michigan.

(c) The Comptroller of the Currency discharged the National Bank's Receiver in 1943, without any accounting for these Five Millions of Dollars—although the Treasury well knew the class suit stockholders of the closed Bank claimed these $5,000,000 of disbursements were not only illegal and a breach of trust—but excessive as well.

III. The Closed Bank's stockholders—first learning of these sums of $3,500,000 and $1,250,000 paid out for claimed Attorneys fees and Clerks' hire respectively, filed two accounting actions in 1943 against the Government in the Court of Claims asserting it, as a trustee, had illegally and excessively spent admitted trust funds—placed in its hands under the provisions of the National Bank Act of Congress.

IV. These first class stockholders' accounting actions (causes Nos. 45,956 and 45,957 United States Court of Claims) were dismissed on the Government's demurrer—

on the ground—that the Bank's stockholders Holding Company (Detroit Bankers Company) should have brought the action for accounting.

See Court of Claims' Opinion, filed December 4, 1944, 102 Court of Claims 233.

This ruling became, therefore, the law of the case—and specifically adopted the contention of the Government—stated at pages 86 and 87 of its brief in the first two actions (Nos. 45,956 and 45,957) in these words, namely:

> "For Plaintiffs are not stockholders of the bank, the holding company (now its receiver) is. Thus if a derivative suit is to be brought (in lieu of action by the receiver of the Detroit Bank or by the Bank itself) the receiver of the holding company is the only stockholder that can do it."

V. It is important that all the closed Bank's stockholders had, in 1929, exchanged their Bank shares for shares in the Detroit Bankers Company—which thereafter held of record all the closed First National Bank's capital stock.

But—on insolvency of the Bank in 1933 (its assets actually paid on liquidation all depositors 107 cents on the dollar—but the arbitrary closing of the Bank in February, 1933—by the Treasury's Comptroller of the Currency—

ruined the Bank's stockholders—for they lost, their entire $400,000,000 of market values of their shares—and were compelled to pay about $20,000,000 in stock assessments—

the United States Sixth Circuit Court of Appeals in the Bank Receiver's stock assessment case (86 Fed. (2d) 510) held the individual Holding Company stockholders were the actual Bank stockholders (and not the Holding Company) and thus individually liable to the National Bank Receiver for the double assessment under the National Banking Act.

VI. Thus in December, 1945, the newly appointed Holding Company Receiver, H. William Klare, filed in the Court of Claims, Cause No. 46,771, a new petition for the same accounting of the same $5,000,000—

alleging no prior knowledge by the old Receiver of Detroit Bankers Company (See paragraph 48, Record 31) or by any of the closed Bank's stockholders—of the claimed wrongful and excessive disbursements of the $5,000,000 by the closed Bank Receiver—now discharged by the Comptroller and without any accounting whatever being made to any one of this $5,000,000.

Thereupon, the Government again demurred to the Holding Company's new Receiver's action as above set forth.

VII. It is also most important that the facts respecting said previous settlement between the two receivers—and made by the Holding Company Receiver under authority of the State Court of Michigan and by the Bank Receiver under the authority of the Federal Court at Detroit—

were all well known to the Treasury and the Department of Justice—

at the time the demurrers in causes Nos. 45,956 and 45,957 were filed and the Government's brief submitted to the Court of Claims—which knowing thereof—

made no claim whatever that the wrongful spending of this $5,000,000 by the Treasury—had keen known or settled by the Holding Company's Receiver, or that the National Bank Receiver had made any attempt to account for the $5,000,000 of illegal disbursements for the Bank Receiver's private attorneys and/or the so-called Clerks' hire in Washington.

Had any contention whatever by the Government been made in the first Court of Claims accounting actions that any settlement of the $5,000,000 of misspent Bank funds had been made—or that the Michigan State Courts had ever approved or passed upon or knew of the $5,000,000 of illegal attorneys fees and clerks' hire so paid out by the Treasury in Washington—

a proper application could have been made by the class suit stockholder plaintiffs in the prior causes Nos. 45,956 and 45,957 to the State Court for relief from such a claim of settlement—at the very time the State Court reopened the State Court Holding Company Receivership—and appointed the new Receiver, H. William Klare—and authorized him to file in the Court of Claims—the instant accounting action in Cause No. 46,771. See the order of June 26, 1945, entered by the Circuit Court for the County of Wayne,

Michigan, In Chancery, In Re Dissolution of Detroit Bankers Company, Cause No. 214,667—attached to the Petition in Court of Claims Cause No. 46,771, the case at bar, as Exhibit A.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

(1) The Government has the same duty to account as a Trustee for Trust Funds under its control, as any individual.

(2) The law of the case was established by the opinion of the Honorable Court of Claims filed December 4, 1944 in Causes Nos. 45,956 and 45,957 reported in 102 Court of Claims 233.

(3) It is res adjudicata that the Receiver of Detroit Bankers Company (Plaintiff and Petitioner here) is entitled to prosecute this accounting action in behalf of all assessment paying First National Bank-Detroit stockholders.

(4) Petitioner is entitled to a final decision on the merits in the United States Court of Claims as to the claimed illegal and excessive disbursement of the sums of $3,500,000 for private attorneys and $1,250,000 for Clerks' hire in Washington—out of Trust Funds in the control of the Government under Acts of Congress—and admittedly belonging to the assessment paying First National Bank-Detroit stockholders.

(5) The defendant Government as a Trustee is estopped by every principle of fair dealing applying to its *cestui que trust*—to deny that Petitioner, Receiver of Detroit Bankers Company is not the proper party Plaintiff and in interest to prosecute to final determination the instant ac-

counting suit in the Honorable United States Court of Claims.

WHEREFORE, your Petitioner, H. William Klare, Receiver of Detroit Bankers Company, prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Claims, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its Docket,

No. 46,771

H. William Klare,
Receiver of Detroit Bankers Company,
vs.
The United States

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment of December 2, 1946 (sustaining the defendant's demurrer) therein of said United States Court of Claims be reviewed by this Court and for such other and further relief as this Court may deem proper.

H. WILLIAM KLARE,
Receiver of Detroit Bankers Company.

WILLIAM ALFRED LUCKING,
Attorney for Petitioner for Writ of Certiorari,
1607 Ford Building,
Detroit 26, Michigan.

United States of America

IN THE

Supreme Court of the United States

OCTOBER 1946 TERM

No.....

H. WILLIAM KLARE,
Receiver of Detroit Bankers Company,
Petitioner and Plaintiff Below,

vs.

THE UNITED STATES,
Respondent and Defendant Below

BRIEF FOR PETITIONER, H. WILLIAM KLARE, RECEIVER, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE UNITED STATES COURT OF CLAIMS

The opinion was filed December 2, 1946, and is part of the record filed in this Court on this Application for the Writ.

II.

JURISDICTION

The date of the Judgment Order sustaining demurrer to be reviewed is December 2, 1946.

Appellate jurisdiction is based upon Title 28 of U. S. C. A. and the Constitution of the United States.

III.

SPECIFICATION OF ERRORS

The errors in the opinion and judgment of the United States Court of Claims entered on December 2, 1946, which are relied upon by Petitioner, are set out in the statement of "Reasons Relied Upon for Allowance of Writ" in the accompanying petition for Writ of Certiorari.

IV.

BRIEF STATEMENT OF FACTS AND ISSUES IS CONTAINED IN THE PETITION FOR THE WRIT

ARGUMENT ON LAW

I. Procedural Question—

Will this Honorable Court permit Defendant to first defeat in Causes Nos. 45,956 and 45,957—

assessment paying class stockholders' accounting actions, because prior demand was not made upon the Detroit Bankers Company "which owns all of the stock of First National" as stated in Lower Court's opinion, filed December 4, 1944—

and now—when the Receiver of Detroit Bankers Company is plaintiff in this new accounting action *for the same relief*—

permit defendant to now object that Detroit Bankers Company did not pay any First National Bank stock assessments—

and, therefore, claim that Plaintiff Petitioner Receiver cannot maintain this action.

Petitioner and Plaintiff respectfully submits that Plaintiff Receiver is the proper party Plaintiff—that this trust will not be permitted to fail—by such tactics now used by defendant—and that the Lower Court's recent decision in *Ekstrom v. United States,* in 86 Court of Claims 1, is conclusive against defendant's position.

II. Motion to Consolidate Causes—So As to Remedy Such Dilatory Tactics by Defendant's Counsel—

Plaintiff Petitioner moved the Lower Court to consolidate this action (No. 46,771) with the two actions Nos. 45,956 and 45,957—

thus making both the Receiver of the Detroit Bankers Company, as "owner" of all the closed First National Bank's shares—and also the class action assessment paying stockholders—

parties plaintiff before the Lower Court.

Thus, trial on the merits can be speedily had—

freed from any further technical objections by defendant—

unless these accounting actions to recover misappropriated or misapplied trust funds—disbursed by defendant contrary to specific acts of Congress—

can be said to be such "tort" actions—as are excepted from the Lower Court's jurisdiction by the Act of Congress.

On that question—the decisions of the Lower Court of Claims are decisive against defendant's contention but the merits are not now before this Supreme Court.

See—

United States v. State Bank, 10 Court of Claims, 519, affirmed 96 U. S. 30;

Seminole Indians v. United States, 93 Court of Claims 500, affirmed in 316 U. S. 286;

Re Burnell, 44 Court of Claims 535.

III. No Decision on Petitioner's Motion to Consolidate.

No decision on Petitioner's motion to consolidate was made by the Lower Court.

IV. Defendant's Brief Below.

Defendant filed a lengthy brief—126 pages, with an addiitonal 26 pages of immaterial matter—totally improper on its demurrer—

which brief in this action by Klare, Receiver, *is practically the same* as that filed by defendant in the previous class stockholders' accounting actions—decided by opinion filed December 4, 1944—(102 Court of Claims 233),

with the exception that, as just pointed out, defendant now claims the Detroit Bankers Company did not pay the $19,000,000 of First National Bank stock assessments—which defendant argues were paid by the stockholders of Detroit Bankers Company—

But—in these two stockholders' class action causes Nos. 45,956 and 45,957—

defendant in its brief (pages 86 and 87) claimed that Detroit Bankers Company was the proper and necessary party plaintiff—its counsel stating:

> "For plaintiffs are not stockholders of the bank; the holding company (now its receiver) is. Thus if a derivative suit is to be brought (in lieu of action by the receiver of the Detroit Bank or by the bank itself) the receiver of the holding company is the only stockholder that can do it. * * *
>
> Similarly in the two cases at bar, plaintiffs show no effort to get the holding company's receiver to act; neither do they show any reason for not doing so. This is fatal in itself. * * *"

V.

To such evasions—Petitioner Receiver respectfully suggests that:

(a) Defendant is estopped to now claim that the Receiver of Detroit Bankers Company is not the proper plaintiff in interest to prosecute this accounting action, and

(b) The lower Court's opinion filed December 4, 1944—is on such issue, in effect, *res adjudicata* against defendant, for the Lower Court in its opinion held that:

> "The one, therefore, who has the primary interest in conserving the assets of the First National Bank-Detroit, if the receiver of that bank refuses to do his duty, is the receiver of the Detroit Bankers Company, which owns all of the stock of First National. The plaintiffs make no showing that they have called in vain upon him."

VI.

The Lower Court has held repeatedly that defendant Government may not change positions before it.

See—

Meigs v. U. S., 20 Court of Claims 181;
O'Grady v. U. S., 22 Wall. (U. S.) 641;
U. S. v. Land Co., 192 U. S. 355.

VII.

The Lower Court's opinion of December 4, 1944 (102 Court of Claims 233) *is res adjudicata.*

See—

United States v. Moser, 266 U. S. 236.

The Court of Claims' opinion of December 4, 1944 on demurrer—

holding that the Detroit Bankers Company is the proper party plaintiff—

is the law of this case—and thus conclusive on the defendant in this cause.

For in *United States v. Moser, supra*, affirming 58 Court of Claims 164, this Supreme Court said:

> "A determination in respect of the status of an individual, upon which his right to recover depends, is as conclusive as a decision upon any other matter. *Clemens v. Clemens*, 37 N. Y. 69, 72; *Pittsford v. Chittenden*, 58 Vt. 49, 57, 3 Atl. 323."

VIII. The Lower Court Made no Decision on the Merits.

The Court of Claims concluded its opinion of December 4, 1944 (102 Court of Claims 233) by stating:

> "We do not pass upon the other grounds relied on by the Government in support of its demurrers. The demurrers are sustained and the petitions dismissed. It is so ordered."

Conclusion—

In Conclusion of this Brief—Petitioner, Receiver of Detroit Bankers Company, respectfully submits to this Honorable Supreme Court that its Writ of Certiorari should issue as prayed for, and that the Reasons relied upon for allowance of the Writ of Certiorari are well founded.

Respectfully submitted,

WILLIAM ALFRED LUCKING,
Attorney for Petitioner Klare.

1607 Ford Building,
Detroit 26, Michigan.

CERTIFICATE OF COUNSEL

The undersigned does hereby respectfully certify to this Honorable Court that he has prepared the annexed Petition for Writ of Certiorari and is familiar with the matters and statements and points therein set forth and verily believes the same to be well founded—that this petition is not filed for purposes of delay—and that he is authorized to file the same in behalf of said petitioner.

WILLIAM ALFRED LUCKING

Dated: February 25, 1947.

NOTE: Although the Merits are not involved—in the Appendix will be found a brief outline of Petitioner's position and claims.

APPENDIX

I.

THE COURT OF CLAIMS HAS JURISDICTION

A. The United States is a Trustee of those assets and moneys—makes no claim of Title thereto—

and thus, must account in the Lower Court—

for all loss caused the *cestui que trust* by its disbursement and use thereof, contrary to law.

It is well recognized that where the Government appropriates money to its use, contrary to law, knowing at the time that it belonged to third persons and not the Government—it is liable and the Court of Claims has jurisdiction.

United States v. State Bank, 10 Court of Claims 519, Affirmed in 96 U. S. 30;
Seminole Indians v. United States, 93 Court of Claims 500, Affirmed in 316 U. S. 286;
Kirkendall v. United States (Court of Claims) 41 Fed. Supp. 766;
Tucker v. United States, (Court of Claims) 42 Fed. Supp. 292.

And the Government must account in the Court of Claims, as a trustee, for disbursing Trust Funds contrary to an Act of Congress.

Re Burnell, 44 Court of Claims 535.

And see the leading case of

U. S. v. Borcherling, 35 Court of Claims 311, affirmed in 185 U. S. 223, 235

where it was said by this Supreme Court that:

> "This we have seen, he had no power under the law to do, and such a disposition of the money could not be successfully pleaded in the Court of Claims as a lawful discharge of the United States."

In this case money in the Treasury of the United States was disbursed under an order of a Court having no jurisdiction. The United States was held liable for the loss.

And the Rule was extended to hold the Government liable as a Trustee for negligent failure to investigate the facts as in *Seminole Nation v. U. S., supra.*

B. A claim founded on a Law of Congress may be brought in the Court of Claims—whether in tort or on a contract.

> *U. S. v. Mfg Company,* 112 U. S. 645 affirming this Court's Decision in 16 Court of Claims 160.

C. Accounting actions founded on laws of Congress may be created, as in effect actions on implied contract.

> *Port Harbor Co. v. U. S.,* 260 U. S. 327, 330

where it was said (in reversing the Lower Court's decision in 56 Court of Claims, 494, sustaining a demurrer) that:

> "If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied, whether it was thought of or not."

D. No regulation of a Department contrary to the Acts of Congress, is valid or affords any defense for unlawful acts.

> *Eastman Kodak Co. v. U. S.* 99 Court of Claims 569, 48 Fed. Supp. 357

and since there never was such Regulation—there is no presumption that Congress ever knew of violations of law,

as the Lower Court observed in the *Eastman Opinion, supra* at page 572 of 99 Court of Claims.

Myers, et al. v. U. S., 92 Court of Claims 457, 458.

II.

PETITIONER'S ARGUMENT ON THE MERITS ON EXPENDITURES OF $1,251,000 FOR SO-CALLED CLERKS' HIRE AT THE SEAT OF GOVERNMENT

A. The withdrawal from the Treasury and use by the United States of this Trust Money for so-called Clerk's Hire, at the seat of Government in Washington, was expressly forbidden by Congress—

by Sections 45, 46 and 66 of Title 5 of U. S. C. A.

B. It is obvious that under Sections 45 and 46 *supra*, it was unlawful for the Treasury Department to have used the $1,251,000 in question—then in the Treasury, in trust for the bank's Creditors and stockholders—

if this $1,251,000 be considered moneys of the United States—recovered into the Treasury—and unappropriated for Clerk's Hire by Congress.

It further seems perfectly obvious that by Section 66, *supra*, Congress explicitly forbade the use of this $1,-251,000 for Clerk's Hire at Washington.

if this $1,251,000 be considered moneys of third persons, recovered into the Treasury, etc.

See—

Myers v. United States, 92 Court of Claims 457

where this Court held custom officials could not be paid from "any private source."

III.

PETITIONER'S ARGUMENT ON MERITS FOR AN ACCOUNTING AND RECOVERY OF THE FUND OF $3,500,000 USED FOR CLAIMED RECEIVER'S ATTORNEYS FEES

Defendant's demurrer admits—

(a) That $3,500,000 of the Bank's assets was taken by the Treasury Department in the years of 1933 to 1943, from Trust Moneys belonging to the Closed Bank—and used to pay certain private attorneys for legal services rendered the Closed Bank's Receiver in the liquidation of the Bank's assets.

There are four important Sections of the Acts of Congress (Title 5 U. S. C. A.) bearing on the legality of these disbursements for these legal fees.

They are Sections 330, 306, 312 and 314.

This Supreme Court had occasion to pass on these general sections of the National Bank Act—for the payment of the receiver's expenses out of the assets of the Bank—in the case of

Gibson v. Peters, 150 U. S. 342 decided November 13, 1893.

It was there held that a District Attorney, who had performed legal services for the Receiver of a Closed National Bank—could not recover any extra compensation, because required by Section 330 of Title 5 U. S. C. A. above quoted—to do this work as a part of his duties "under the direction and supervision of the General Counsel for the Department of the Treasury."

The above provisions expressly forbid the hiring and paying of any attorney for any service for any branch

or department of the Government, such as the Comptroller of the Currency's "Insolvent National Bank Division" of the Treasury—unless in cases "specially authorized by law"—and then only on the certificate of the Attorney General—as required by Section 314 of Title 5—*supra.*

And the demurrer admits no compliance was made or attempted by the Treasury Department with any of these provisions of law.

IV.

CONSOLIDATION IS PROPER—OF THE THREE CAUSES NOS. 45,956, 45,957 AND THE CASE AT BAR NO. 46,771

Defendant, as pointed out in the Procedural Question at the beginning of this brief—

having now objected in the case at bar, that this Receiver of Detroit Bankers Company—(which in the first two cases Defendant argued must be in those cases)— cannot now maintain this accounting suit—because Detroit Bankers Company did not pay any stock assessments to the National Bank Receiver—

it seems proper that all three cases be now consolidated—since defendant's attorney in his current brief in this Cause No. 46,771, states on page 54 that:

> "Except for the fact that the receivership is now closed, and except that the present suit is being brought in another name, the petition in the case at bar is essentially the same as those which were dismissed by this court."

Again, we quote from defendant's brief, pages 86, 87, in the two class stockholders' actions (Nos. 45,956 and 45,957) as follows:

"For plaintiffs are not stockholders of the bank; the holding company (now its receiver is * * *.

Similarly in the two cases at bar, plaintiffs show no effort to get the holding company's receiver to act; neither do they show any reason for not doing so. This is fatal in itself. * * *"

SUCH A CONSOLIDATION OF CAUSES IS PROPER—

for the Lower Court has often sustained class accounting actions against the defendant United States—as in

Cherokee Indians v. United States, 27 Court of Claims 1, affirmed in 148 U. S. 427.

Money recovered into the Treasury of the United States belonging to third persons and of which the United States makes no claim of title or right—

constitutes a Trust Fund, for which the Government must account as a Trustee, as a matter of General Law.

The *Otawa and Chippewa Indians v. United States,* 42 Court of Claims 240, where it was said (page 247) that:

"The obligation which the Government was under to account for the securities which it had in its possession as trustee for the Indians did not grow out of the treaty, but was imposed upon it by the law. The treaty obligated it to make these investments for the Indians; the law imposed upon it the duty to account for them as trustee to its *cestui que* trust. * * *"

And see—

Seminole Nation v. United States, 316 U. S. 286.

V.

Plaintiff's petition fairly raises the issue of excessive disbursal and expenditure of trust funds.

Nowhere throughout the 73 pages of Defendant's long brief in the lower Court does it argue or claim that the $5,000,000 of the Closed Bank's stockholders' funds—were not in every true sense—

trust funds held by it as a fiduciary—and to *which Funds defendant made no claim of title or right.*

Under such facts—it is submitted the lower Court should decide this claim "on equitable principles relating to fraudulent acts of those charged with the duty of administering the property" of *cestui que* trusts—as was so held in

Sioux Tribe, 97 Ct. of Claims 613, 685.

VI.

(1) The First National Bank Receiver was discharged (and the Receivership deliberately closed by the Comptroller of the Currency) after the two Bank stockholders' accounting actions Nos. 45,956 and 45,957 were pending in the Court of Claims.

Deliberately the Comptroller and his National Bank Receiver did nothing whatever to account for this claimed excessive and illegal disbursement of $5,000,000 of the closed Bank's Funds.

The Defendant is in no position to now complain that Plaintiff Receiver of Detroit Bankers Company did not make a demand upon the Bank's Receiver (who had previously been discharged by the Treasury) to bring this accounting action.

(2) Plaintiff Receiver made all necessary and proper demand upon the Treasury.

See Petition, Exhibits B, C and D, R. 37 to 52.

When the defendant obtained the Lower Court's opinion of December 4, 1944, and the dismissal of the two class stockholders accounting suits by this Honorable Court (Nos. 45,956 and 45,957)—

because no prior demand had been made upon the Detroit Bankers Company or its Receiver by Plaintiff stockholders—

the Defendant had knowledge that the Detroit Bankers Company had been dissolved—and that its State Court Receivership had been closed.

Defendant had notice of the hearing on the petition to reopen the State Court Receivership—see Exhibit A, for Court's Order appointing Plaintiff (R. 34) and defendant made no objection to said order or its entry.

VII.

DEFENDANT'S ESTOPPEL

Defendant having objected in these two prior accounting causes in the Court of Claims, that the Receiver of Detroit Bankers Compony was not a plaintiff, and that no demand had been made upon him to sue (the defendant well knowing then that Detroit Bankers Company receivership had been closed—and that no demand was possible)—

is now estopped to claim that Plaintiff Receiver Klare (who was especially appointed to prosecute this action) is not the proper and qualified party Plaintiff herein.

The Lower Court's opinion in said Causes Nos. 45,956 and 45,957 filed December 4, 1944, *is res adjudicata* against

defendant's present claim that Plaintiff Receiver cannot maintain this action—as pointed out in the procedural question, at the opening of this Brief.

VIII.

MERITS OF DEMURRER

(1) The Demurrer should be overruled on its merits—on the authority of the Lower Court's decisions in the leading cases of

Ekstrom v. United States, 86 Court of Claims 1;
State Bank v. United States, 10 Court of Claims 519, Affd. 96 U. S. 30;
Seminole Indians v. United States, 93 Court of Claims 500, Affd. 316 U. S. 286;
United States v. Borcherling, 35 Court of Claims 311, Affd. 185 U. S. 223, 235;

which hold conclusively that funds taken possession of by the Government under Acts of Congress (to which the Government makes no claim of right or title as in the case at bar)

cannot be disbursed by defendant Government contrary to Acts of Congress, without the defendant being liable to account therefor in the Court of Claims.

(2) Assuming the defendant's spending of $5,000,000 for Clerks' hire in Washington and for Receiver's private attorneys fees and expenses in Detroit—was illegal—and prohibited by specific Acts of Congress—then Plaintiff Receiver has an absolute right of recovery under such decisions as—

Ekstrom v. United States, supra (illegal collection by Government of tax money);

United States v. Borcherling, supra (money disbursed by Government under an order of a court having no jurisdiction);

And see—

Ervien v. United States, 251 U. S. 41 (where illegal disbursement of *cestui que* trusts's money contrary to law, by a state official, was enjoined by this Supreme Court).

IX.

THIS ACTION IS NOT A TORT ACTION EXCLUDED BY CONGRESS FROM THE COURT'S JURISDICTION

The Lower Court has repeatedly decided the merits of claims based upon excessive or illegal payments by defendant of trust moneys in its hands—

belonging to third persons—and to which the Government makes no claim of title or right.

See—

Caldwell, et al. v. U. S., 53 Ct. of Claims 33;
Re Burnell, 44 Court of Claims 535;
State Bank v. United States, 10 Court of Claims 519.

X.

LACHES

Defendant's claimed defense of laches is without merit of any kind or description for—

(a) The Petition alleges total lack of knowledge of the excessive and illegal disbursements of the trust funds—see

Paragraphs 16, 17, 31, 39, 41 and 42 of the Petition.

(b) Ratification or laches must be upon knowledge—for

"knowledge is necessary in any event."

See—*United States v. Beebe,* 180 U. S. 343, 354, where this Supreme Court said in overruling a demurrer interposing defense of laches, that:

> "Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them. Here, it is denied, by an express averment in the bill to that effect, and must be taken as a fact. There being no knowledge of the facts on the part of the Government until March, 1890, we think there were no laches on its part which would bar the maintenance of this suit. * * *"

It is respectfully submitted that defendant's demurrer should have been overruled on the merits.

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